

3. Mr. Hauck responded to me via email on January 19, 2016. He agreed to accept service on behalf of Mr. Fabrizio, but he reserved the right to challenge the notice on non-jurisdictional grounds. I asked him on what grounds the MPAA would challenge the deposition notice, and Mr. Hauck responded that the MPAA was “just reserving our rights at this point, not asserting a challenge.”

4. On January 22, 2016, Mr. Hauck emailed me to discuss dates for the Fabrizio deposition. In his email, he noted that the MPAA “may object to or file a motion to quash a subpoena for the deposition of Mr. Fabrizio.” In response I told him that Google assumed the MPAA would make any motion to quash the deposition in time for the motion to be resolved prior to the noticed deposition date. Mr. Hauck’s only reply was to say that whether the MPAA would file a motion to quash “seem[ed] like bridges we can cross when we get to them” and that “[p]resumably it would depend on the anticipated scope of the deposition, which we can discuss.”

5. Between January 23, 2016 and February 8, 2016, Mr. Hauck and I continued to work on finding a mutually agreeable date for the Fabrizio deposition.

6. Following these discussions, on February 8, 2016 Google and the MPAA mutually agreed that Mr. Fabrizio would be deposed on March 17, 2016 (the day before fact discovery was set to close). The next day, February 9, I sent Mr. Hauck a subpoena, which set the deposition of Steven Fabrizio for March 17, 2016 in Washington, D.C.

7. The following day, February 10, 2016, Mr. Hauck emailed me to ask for a meet-and-confer regarding the scope of the Fabrizio deposition.

8. We met and conferred by phone on February 17, 2016, the first mutually available date. When we spoke, I explained that Google was interested in questioning Mr. Fabrizio about the same general topics covered in its prior document subpoena served on the MPAA: the

MPAA's role in directly and indirectly influencing AG Hood to take action against Google. I also reiterated that Google was not interested in legitimately privileged information. Mr. Hauck nevertheless indicated the MPAA was likely to move for a Protective Order in an effort to block the deposition.

9. I did not hear further from Mr. Hauck until February 23, 2016, when he sent me a letter stating that the MPAA declined to make Mr. Fabrizio available for the March 17 deposition and it planned to file a motion to quash. The letter gave Google until February 25, 2016, to indicate whether it wished to have an additional meet-and-confer.

10. I emailed Mr. Hauck on February 25, 2016 to say that Google took issue with the MPAA's decision not to make Mr. Fabrizio available for the deposition, and that, absent an order from the court, the MPAA's obligations were clear.

11. I heard nothing from Mr. Hauck for eight days. Then, on March 4, 2016 (a Friday), Mr. Hauck emailed me to ask if Google would sign the Certificate of Good Faith required by this Court's local rules.

12. I was travelling that Friday, but I responded to Mr. Hauck the following Monday, March 7, 2016. I told Mr. Hauck that the MPAA's motion to quash was untimely and violated the local rules, but that if the MPAA wished to proceed Google would provide a Certificate of Good Faith that reserved its rights with regard to the rule violations.

13. Mr. Hauck responded via email, indicating that the MPAA would proceed with its motion, that Mr. Fabrizio would not appear on March 17, and that Google should provide the Certificate of Good Faith. Later that day, I provided Mr. Hauck with a signed Certificate of Good Faith, which was filed in conjunction with the MPAA's Motion to Quash.

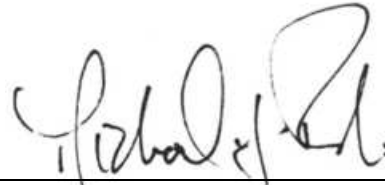
Authentication of Other Exhibits

14. Attached hereto as Exhibit A is a true and correct copy of pages 1-2, 32-38, 50-55, 78-81, 100-102, 123-131, and 179-185 of the certified transcript of the deposition of Brian Cohen, the MPAA's former Director of External State Government Relations, held on October 8, 2015, at the offices of Wilson Sonsini Goodrich & Rosati in Washington, D.C.

15. Attached hereto as Exhibit B is a true and correct copy of the transcript of the July 29, 2015 hearing before Judge Schofield of the Southern District of New York on motions to compel and motions to transfer filed by Google against several of the MPAA's member studios.

* * *

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct. Executed on March 22, 2016.

A handwritten signature in black ink, appearing to read "Michael H. Rubin", is written over a horizontal line.

Michael H. Rubin

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

GOOGLE, INC.) No.
Plaintiff) 3:14-cv-981-HTW-LRA
vs.)
JIM HOOD, ATTORNEY)
GENERAL OF THE STATE OF)
MISSISSIPPI, IN HIS)
OFFICIAL CAPACITY)
Defendant)

Videotaped Deposition of Brian Cohen
Washington, D.C.
October 8, 2015
9:06 a.m.

Reported by: Bonnie L. Russo
Job No. 2146100

1 Videotaped Deposition of Brian Cohen held at:

2
3
4
5 Wilson Sonsini Goodrich & Rosati
6 1700 K Street, N.W.
7 Washington, D.C.
8
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12
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14
15
16
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19

20 Pursuant to Notice, when were present on behalf
21 of the respective parties:
22
23
24
25

1 A. Who else that was not part of the
2 studios.

3 Q. No.

4 I asked you to list anyone on that
5 call. So I would like to be real clear.

6 A. Got it.

7 Q. Who was on that call?

8 A. I apologize. I thought you had
9 asked me who from the studios was on that call.

10 Q. Talked about them. Who was on the
11 call?

12 A. Vans Stevenson, Melissa Patack,
13 Angela Miele, Sara Walsh. Those in the MPAA
14 State Government Affairs team. In the studios,
15 State Government Affairs' representatives, the
16 people that I had listed and other people whose
17 names I forget.

18 Q. Okay. And the -- the people that
19 you -- the names that you forget are the
20 individuals from paramount and NBCU?

21 A. Correct.

22 Q. Is the NBCU individual Rick Smotkin?

23 A. He was occasionally on those calls.

24 Q. And he worked for NBCU?

25 A. He worked for Comcast.

1 Q. But he was on those calls for NBCU?

2 A. Yes.

3 Q. Do you know who else would have been
4 on those calls? Does that jog your memory, at
5 all, for -- for NBCU?

6 A. For the weekly State Government
7 Affairs calls?

8 Q. Sure.

9 A. No.

10 Q. Were there any other weekly calls
11 set up on State Government Affairs or with
12 he -- with this group of people?

13 A. Weekly calls with State Government
14 Affairs or this group of people?

15 Q. Yes.

16 Did you have any other standing
17 calls with this group of people?

18 A. No.

19 Q. With any subset of this group of
20 people?

21 A. Yes.

22 Q. What were those calls?

23 A. Well, Rick was part of an AG working
24 group call.

25 Q. Okay. Who was -- who else was part

1 of that group, the AG working group?

2 A. Bill Guidera, so Vans, David Green
3 from NBC; Troy Dow from Disney. I'm trying to
4 remember. Tom Galvin, Digital Citizens
5 Alliance. Patrick Lynch, Mike Moore. Those
6 are the names that come to mind.

7 Q. Okay. Did you communicate in
8 writing to the AG working group?

9 A. Yes.

10 Q. Did you communicate in writing over
11 e-mail to the AG working group?

12 A. Let me rephrase. We as MPAA did.

13 Q. Did you personally, on behalf of the
14 MPAA, send e-mails to the AG working group?

15 A. I occasionally, on behalf of the
16 MPAA, yes.

17 Q. What is the difference between the
18 AG working group and the state -- I'm -- I'm
19 forgetting the name. The other call?

20 A. State Government Affairs was focused
21 on legislative issues in the states. The AG
22 working group was focused on the general issue
23 of piracy and intellectual property theft.

24 Q. Was Google a main focus of the AG
25 working group?

1 A. Define "main focus"?

2 Q. Was Google a focus of the AG working
3 group?

4 A. Yes.

5 Q. What other companies were a focus of
6 the AG working group?

7 A. Any companies in the search engine
8 universe.

9 Q. Any company in the search engine
10 universe. Please list them, that you focused
11 on in those calls.

12 A. Define "focus." I mean...

13 Q. I'm not trying to play a game. I
14 mean, I'm trying --

15 A. Yeah.

16 Q. -- to figure out what you talked
17 about on those calls. You tell me.

18 A. We talked about strategies to combat
19 intellectual property theft that related to
20 search engines, including Google.

21 Q. The name of the call was the AG
22 working group, right?

23 A. Yes.

24 Q. So you weren't talking about
25 strategies at large, you were talking about

1 some sort of strategy that involved Attorneys'
2 General, right?

3 MR. ROMMEL: Objection. Misstates
4 evidence.

5 THE WITNESS: Can you repeat the
6 question?

7 BY MR. RUBIN:

8 Q. Sure.

9 You weren't talking about strategies
10 written large to combat issues. You were
11 talking about strategies involving Attorneys
12 General; isn't that right?

13 MR. ROMMEL: Objection.

14 THE WITNESS: No. No, that's not
15 right.

16 BY MR. RUBIN:

17 Q. Then, please describe to me the
18 strategies that were discussed on those calls.

19 MR. HANDZO: And let me just
20 interject because this has a potential to get
21 into legal strategies and legal advice, so I
22 don't have any problem with your answering with
23 respect to general business strategies. To the
24 extent that there was legal advice on the
25 phone -- on these calls, I would object if that

1 invades the MPAA provision.

2 MR. RUBIN: There -- as described to
3 me, there is no attorney-client privileged
4 relationship listed on that call, as that would
5 be help by the MPAA.

6 MR. HANDZO: Well, I don't agree
7 with your characterization, but my point to the
8 witness is if there are legal strategies
9 involved, whether they were coming from lawyers
10 directly or whether they were being repeated by
11 people on the call to talk to the lawyers, I
12 would object to any discussion of legal
13 strategy as opposed to business strategy.

14 THE WITNESS: And you -- you did jog
15 my memory. Ben Sheffner was also on those
16 calls.

17 BY MR. RUBIN:

18 Q. Okay. What strategies were
19 discussed on those calls?

20 MR. HANDZO: And same objection.

21 THE WITNESS: There were different
22 strategies discussed generally to compel
23 companies, such as Google, to change behavior,
24 to prevent the theft of intellectual property.
25 Some of those strategies entailed legislative,

1 some of them were legal, as you heard, some of
2 them were simply ways to compel stakeholders to
3 come to the table to have discussions about
4 voluntary actions.

5 Q. Did all of the strategies discussed
6 on those calls involve, in some way, attorneys
7 general?

8 A. No.

9 Q. So the AG working group meandered
10 from its title?

11 A. Yes.

12 Q. What else -- what, beyond the use of
13 attorneys general, were considered as
14 strategies to compel search engines to change
15 their behavior?

16 A. Can you repeat the question?

17 Q. What else, beyond the use of
18 attorneys general, were considered as
19 strategies to compel search engines to change
20 their behavior?

21 A. Legislative.

22 Q. What sort of legislative strategies?

23 A. Strategies not too dissimilar from
24 the strategies that were tried previously.

25 Q. What strategies were tried

1 Q. So, again, your title there was
2 director, External State Government Relations;
3 is that right?

4 A. Yes.

5 Q. You were a lobbyist; isn't that
6 right?

7 A. No.

8 Q. No, you weren't lobbying?

9 A. No.

10 Q. I would like to introduce
11 Plaintiff's Exhibit --

12 MR. RUBIN: Can we go off the record
13 for one second?

14 THE VIDEOGRAPHER: Off the record at
15 9:48.

16 (Pause.)

17 THE VIDEOGRAPHER: On the record at
18 9:49.

19 MR. DAVIS: As a housekeeping
20 matter, this is Mike Davis, Mr. Cohen's
21 attorney. I am e-mailing to Google's counsel
22 the common interest agreement between Mr. Cohen
23 and the MPAA.

24 MR. ROMMEL: Can you copy me on
25 that, as well?

1 MR. DAVIS: Sure.

2 MR. RUBIN: I would like to
3 introduce Plaintiff's Exhibit 1.

4 (Deposition Exhibit No. 1 was marked
5 for identification.)

6 BY MR. RUBIN:

7 Q. Mr. Cohen, what I just handed you is
8 a copy of Mississippi Code, Title 5, Chapter 8,
9 titled "Lobbying Reform Act of 1994.

10 Do you see that?

11 A. Yes.

12 Q. If I could call your attention to --
13 on the printout, it's Page 5 of 8, definition
14 K, lobbying.

15 A. Okay.

16 Q. Could you read K, the first sentence
17 under K?

18 A. KI?

19 Q. Yes, lobbying -- it says, "Lobbying
20 means."

21 A. "Lobbying means influencing or
22 attempting to influence legislative or
23 executive action through oral or written
24 communication."

25 Q. Does that not describe what -- part

1 of what you did in your job at the MPAA?

2 MR. ROMMEL: Objection.

3 Argumentative.

4 MR. DAVIS: Objection. Form.

5 MR. ROMMEL: Calls for a legal
6 conclusion, as well.

7 BY MR. RUBIN:

8 Q. You can answer the question.

9 Mr. Cohen?

10 A. I'm sorry. Was I waiting?

11 Q. You can answer the question.

12 No. You -- your -- today, I --

13 I'm -- I suspect you're going to hear quite a
14 number of objections. As we talked about at
15 the beginning, you can answer the question.
16 Only if one of your lawyers instruct you not to
17 answer should you not answer the question. So,
18 here, you should answer the question.

19 A. Got you.

20 Q. And I'll restate the question now --

21 A. Okay.

22 Q. -- because there's been a little
23 passage of time.

24 A. Okay.

25 Q. K says, "Lobbying means influencing

1 or attempting to influence legislative or
2 executive action through oral or written
3 communication." It goes on -- it describes
4 some other things.

5 But that first definition, that
6 describes, at least in part, what you did as a
7 part of your job at the MPAA; isn't that right?

8 MR. DAVIS: Objection. Form and
9 foundation.

10 MR. ROMMEL: Argumentative. Calls
11 for legal conclusion.

12 THE WITNESS: Part of my job. I
13 think part -- part of the MPAA's job was to
14 service the studios and believed that they were
15 victims of crime, and so part of that job was
16 to work with law enforcement and others to
17 educate and train and hope that they would take
18 action. So if you equate that with that
19 definition, that was part of what MPAA did, but
20 it was under the auspices of being a victim of
21 crime.

22 BY MR. RUBIN:

23 Q. I'm asking for a "yes" or "no"
24 question [sic], Mr. Cohen. Rather, I'm asking
25 a yes-or-no question that calls for a yes-or-no

1 answer.

2 MR. ROMMEL: Objection.

3 Argumentative.

4 MR. DAVIS: Same objection. Form.
5 Foundation.

6 MR. RUBIN: Counsel, I'm not asking
7 an argumentative question. If you could keep
8 your objections to a flat objection, I'd
9 appreciate it.

10 MR. ROMMEL: I'm allowed to make any
11 evidentiary objection I -- I'm entitled to
12 make, so I'm going to make them.

13 BY MR. RUBIN:

14 Q. Mr. Cohen, I'm simply asking for you
15 to read those words and -- and -- and tell me
16 if that was within the compass of what you did.

17 A. When you say --

18 MR. DAVIS: Objection. Form.
19 Foundation.

20 THE WITNESS: Would executive action
21 mean calling a meeting to discuss issues of
22 concern?

23 BY MR. RUBIN:

24 Q. Sure, if that's what you understand
25 it to mean.

1 A. Then, yes. That was something the
2 MPAA did.

3 Q. Were you -- are you a registered
4 lobbyist, or were you a registered lobbyist in
5 Mississippi?

6 A. No.

7 Q. Did anyone else at the MPAA
8 register -- register as a lobbyist in
9 Mississippi?

10 MR. ROMMEL: Objection.

11 THE WITNESS: I don't know.

12 BY MR. RUBIN:

13 Q. Have you ever registered as a
14 lobbyist anywhere?

15 A. No.

16 Q. Were there any discussions at the
17 MPAA about registering as a lobbyist?

18 MR. HANDZO: Again, objection to the
19 extent that it might reveal discussions with
20 attorneys on that issue. If there are
21 non-legal discussions, you can talk about it.
22 If those were legal discussions, then don't.

23 THE WITNESS: I don't remember any
24 discussions.

25 BY MR. RUBIN:

1 A. General overarching strategy with
2 regards to Google.

3 Q. Whose strategy?

4 A. The MPAA's.

5 Q. Who developed the strategy?

6 A. I don't know.

7 Q. Who coined the term "Project
8 Goliath"?

9 A. I don't know.

10 Q. Who would know?

11 A. I don't know.

12 Q. Who is the expert in Project
13 Goliath?

14 A. I don't know.

15 Q. Whose baby was Project Goliath?

16 MR. ROMMEL: Objection.

17 MR. DAVIS: Objection to form.

18 THE WITNESS: I don't know.

19 BY MR. RUBIN:

20 Q. Who would know?

21 A. I don't know.

22 MR. ROMMEL: Objection. Calls for
23 speculation.

24 BY MR. RUBIN:

25 Q. Who's in charge of the MPAA?

1 A. Chris Dodd.

2 Q. And all decisions of consequence are
3 run by Chris Dodd?

4 MR. DAVIS: Objection.

5 MR. ROMMEL: Objection. Lacks
6 foundation.

7 THE WITNESS: I don't know.

8 BY MR. RUBIN:

9 Q. When did you first hear the term
10 "Project Goliath"?

11 A. It was towards the end of my tenure
12 there. I don't recall exactly. You know, I --
13 I finished around April 2014. So it was
14 towards the end, but I can't tell you the
15 specific date.

16 Q. Was the term "Project Goliath" ever
17 used on the AG working group calls?

18 A. I don't know.

19 Q. Did you ever hear anyone else use
20 the term?

21 A. Yes.

22 Q. Who did you hear it from?

23 A. General counsel at MPAA, Steve
24 Fabrizio.

25 Q. In what context?

1 A. Again, this overarching theme of --
2 with regards to Google.

3 Q. What did he tell you?

4 MR. HANDZO: Objection. Mr.
5 Fabrizio, obviously, is a lawyer, so to the
6 extent that Mr. Fabrizio is giving -- dealing
7 legal strategy or legal advice, I would object
8 to the witness answering that question.

9 THE WITNESS: I don't remember.

10 BY MR. RUBIN:

11 Q. You don't remember what he said?

12 A. No.

13 MR. RUBIN: I want to be clear with
14 respect to the objection just made by the MPAA
15 that it's not clear, at all, that the --
16 anything with respect to Project Goliath is
17 privileged. We don't believe that it is. It's
18 a business strategy. We don't believe that
19 there's any legal advice involved, whatsoever.

20 MR. HANDZO: You're entitled to your
21 opinion. Obviously, I have a different one.

22 MR. RUBIN: That seems to be the
23 case.

24 BY MR. RUBIN:

25 Q. Who else did you hear use the term

1 "Project Goliath"?

2 A. Vans, Michael O'Leary.

3 Q. Did Project Goliath involve others
4 outside the MPAA?

5 A. I don't know.

6 Q. Did it involve the member studios?

7 A. I don't know.

8 Q. Did it involve efforts to influence
9 State's attorneys general?

10 A. It did involve efforts to educate
11 State's attorneys general.

12 Q. And push them to take action?

13 A. Yes.

14 Q. So not just to educate State's
15 attorneys general?

16 MR. DAVIS: Objection. Form.
17 Foundation.

18 THE WITNESS: To educate them to
19 take action.

20 BY MR. RUBIN:

21 Q. What sort of action?

22 A. To compel Google to come to the
23 table to have discussions about changing its
24 practices.

25 Q. Changing what practices,

1 A. No.

2 Q. Who drafted the presentation that
3 you gave?

4 A. It was sort of a group effort from
5 all those involved in this meeting.

6 Q. Was that done electronically?

7 A. I don't remember.

8 Q. You don't remember if you
9 collectively drafted a presentation
10 electronically or not?

11 A. It may have been verbally, in -- in
12 person. It may have been electronically. I
13 can't say with certainty. I don't recall.

14 Q. What was the purpose of the meeting
15 from the MPAA's perspective?

16 A. I was not part of leadership or
17 policy discussions from the MPAA. I was
18 implementing, so I don't know.

19 Q. What did you understand it to be?

20 A. I understood the purpose to be
21 continuing education to work with law
22 enforcement as victims of crime to demonstrate
23 the dangerous behavior to our industry but to
24 many industries.

25 Q. Did you seek to incentivize Attorney

1 General Hood to take action against Google?

2 MR. ROMMEL: Objection.

3 MR. DAVIS: Objection. Form.

4 Foundation.

5 MR. ROMMEL: Argumentative.

6 Speculation. Calls for a legal conclusion.

7 THE WITNESS: No.

8 BY MR. RUBIN:

9 Q. The MPAA did not have as a goal of
10 that meeting to seek to have Attorney General
11 Hood take any action with respect to Google,
12 whatsoever?

13 A. Well, it's a separate question.

14 Just --

15 Q. I'm asking you a yes-or-no question.

16 A. Can you repeat the question?

17 Q. Did the MPAA have as a goal of that
18 meeting to have Attorney General Hood take any
19 action with respect to Google, whatsoever?

20 A. Yes, MPAA would have wanted Google
21 to come to the table to change its behavior.
22 We encouraged General Hood and others to
23 continue these important conversations with
24 Google.

25 Q. What means did you seek to have

1 Attorney General Hood employ to have Google
2 come to the table?

3 A. I think a variety of different means
4 were discussed. I think the core goal was
5 simply through the course of these
6 conversations and platforms, such as the NAAG
7 IP Committee, that they would come to the table
8 and have a good dialogue. I think it was
9 evident if that was not going to work other
10 means would -- would be necessary. Some of
11 those are legal, which I can't talk about
12 because of the privilege. Some of them were to
13 continue to have this conversation through
14 other platforms, including the public purview.

15 Q. Which means did you discuss at the
16 meeting with Attorney General Hood to have
17 Google come to the table?

18 A. I think all means were discussed.

19 Q. Which specific means were discussed?

20 A. Continued conversations through AGs
21 and the NAAG IP Committee, written letters to
22 follow up to Google regarding these questions,
23 continued elevation of the issue in the public
24 purview to hope that they would come to the
25 table, and then if none of those worked, legal

1 too.

2 A. Okay.

3 Q. You sent the document. Can you tell
4 me --

5 A. Right.

6 Q. -- what it refers to?

7 A. I don't -- again, I don't recall the
8 actual instance when I was sending the
9 document. I'm sure that I did send the e-mail.
10 It's right here.

11 Q. Uh-huh.

12 A. I -- it looks like I did attach
13 this. That would appear to be a date; but,
14 again, I can't say with certainty that that
15 refers to a date.

16 Q. Okay. I'm going to ask you -- ask
17 you a specific question. On what day did you
18 send this e-mail?

19 A. It looks like Thursday, January
20 17th, 2013.

21 Q. What's the date format in the
22 subject of the attachment?

23 A. Day of the week, month of the year,
24 the actual day, the year and the time.

25 Q. In the subject of the attachment,

1 what's the format? What's the number?

2 A. In the subject -- it's 1-17-13.

3 Q. And what do you understand that to
4 mean?

5 A. Again, I would presume that that's
6 referring to the date.

7 Q. Okay. Would you -- do you
8 understand this to mean that this was the final
9 version of this document as of this date that
10 you sent this e-mail?

11 A. Yes.

12 Q. Were there draft versions of this
13 document that existed prior to this version?

14 A. I don't remember. I don't remember
15 if there were drafts.

16 Q. Do you have a habit of labeling
17 documents "final" when there aren't drafts
18 preceding them?

19 A. No.

20 Q. You were sending this document for
21 what purpose?

22 A. This was follow up on behalf of the
23 MPAA. So, again, I was a contact, a messenger,
24 a liaison for the MPAA, and it appears the RIAA
25 and IACC to thank and provide recommendations

1 to the NAAG IP Committee chaired by General
2 Hood for suggestive follow-up actions that
3 would help propel and continue the conversation
4 from the Florida meeting.

5 Q. You were suggesting actions that
6 Attorney General Hood could take as chair of
7 the NAAG IP Committee at the next NAAG meeting;
8 is that right?

9 MR. ROMMEL: Objection.

10 THE WITNESS: Yes.

11 Actions that the committee could
12 take.

13 BY MR. RUBIN:

14 Q. Actions that the MPAA, the RIAA, and
15 IACC were interested in having Attorney General
16 Hood pursue; is that right?

17 MR. ROMMEL: Objection. Misstates
18 testimony.

19 THE WITNESS: The MPAA and it
20 appears the RIAA and IACC were interested in
21 only speaking, from what I would surmise from
22 the MPAA, as a victim of crime with the
23 committee taking actions that would help propel
24 and continue the conversation.

25 BY MR. RUBIN:

1 Q. You were interested in having
2 Attorney General Hood as the chair of the IP
3 Committee pursue the action items you attached
4 to this e-mail; isn't that right?

5 MR. ROMMEL: Objection. Misstates
6 testimony.

7 THE WITNESS: I was not personally
8 interested. The MPAA provided recommendations
9 for General Hood who chaired the committee for
10 follow-up actions regarding that NAAG IP
11 Committee.

12 BY MR. RUBIN:

13 Q. And it hoped that -- and the MPAA
14 hoped that Attorney General Hood would follow
15 those recommendations, didn't it?

16 MR. ROMMEL: Objection. Lacks
17 foundation. Speculation.

18 THE WITNESS: Yeah. Yes.

19 BY MR. RUBIN:

20 Q. In the -- in the e-mail that you
21 sent to Meredith Aldridge of Attorney General
22 Hood's office --

23 A. Uh-huh.

24 Q. -- you start by saying, "We look
25 forward to seeing you at DAGA in California."

1 Do you see that?

2 A. I do.

3 Q. What is DAGA?

4 A. Democratic attorneys general
5 Association.

6 Q. Could you explain to me what "DAGA
7 in California" is a reference to?

8 A. There is a conference in California
9 for the Democratic attorneys general
10 Association.

11 Q. When did that take place?

12 A. It looks as though from the e-mail
13 around February 1, 2013.

14 Q. Did you attend that?

15 A. Yes.

16 Q. Do you recall meeting with Attorney
17 General Hood or anyone from his office at the
18 DAGA meeting in California?

19 A. I don't remember or recall.

20 Q. Do you recall working with Senator
21 Dodd about what he was going to be addressing?

22 A. I recall -- I was not very -- I was
23 not really a part of the prep for his -- his
24 address at that conference.

25 Q. Who was part of Senator Dodd's

1 preparations for his address at the DAGA
2 meeting on February 1 in California?

3 A. Vans.

4 Q. Did you have any communications at
5 all with Vans about his prep with Sen -- with
6 Senator Dodd for that presentation?

7 A. Yes.

8 Q. What were the -- what were the
9 substance of those preparations?

10 A. I think Vans and I, potentially
11 others, discussed that this was another good
12 opportunity for Senator Dodd to bring up these
13 important issues of piracy and intellectual
14 property theft before an audience of attorneys
15 general and to recognize some of the leaders in
16 the room, General Hood being one of them.
17 There were potentially others, as well. So
18 those AGs that had -- have been good leaders on
19 the issue.

20 Q. Did you discuss Google, in
21 particular, with Vans as something that Senator
22 Dodd should raise at that meeting?

23 A. I don't remember.

24 Q. You don't recall one way or the
25 other?

1 A. I don't recall if I specifically
2 discussed Google with Vans as part of that
3 speech.

4 Q. Do you recall if Vans told you that
5 Senator Dodd was considering raising Google in
6 that speech?

7 A. I don't remember.

8 Q. But you did suggest to Vans that it
9 would be productive to thank Attorney General
10 Hood -- rather, productive for Senator Dodd to
11 thank and commend Attorney General Hood at
12 that -- in that speech, didn't you?

13 A. I think we discussed it. I don't
14 recall if I suggested it or if Vans suggested
15 it.

16 Q. Who came up with the action item
17 recommendations reflected in the attachment?

18 A. I don't know.

19 Q. Did you help develop them?

20 A. I helped develop them. I don't
21 think I came up with them. I did not come up
22 with them.

23 Q. Where did they originate?

24 A. I don't know.

25 Q. You have no idea where they came

1 from?

2 A. I could guess and have some idea.

3 Q. Okay. Please explain your
4 understanding of where they came from.

5 A. Probably collaboration amongst Vans,
6 some of the studios who were interested in
7 this, other stakeholders such as the RIAA who
8 had an interest in these issues. There was
9 generally a group collaboration when it came to
10 this.

11 Q. Did you -- what input did you
12 provide into the creation of the NAAG action
13 item -- pardon me -- the NAAG action item
14 recommendations?

15 A. I think that I thought sending
16 follow-up letters to the different sectors of
17 the committee, the search, the advertising, the
18 payment processing content was a good way to
19 ensure that the questions were continued --
20 that the conversation was continued.

21 Q. And who do you think should draft
22 those letters?

23 A. I don't recall having an opinion who
24 should draft. I don't recall drafting.

25 Q. Do you recall having meetings about

1 the creation of the action item recommendations
2 reflected in the attachment to Exhibit 4?

3 A. Yes.

4 Q. How many meetings do you recall?

5 A. I don't know.

6 Q. Do you recall having e-mail
7 exchanges with respect to the attachments
8 reflected in Exhibit 4?

9 A. Yes.

10 Q. Did you have communications with
11 Attorney General Hood's office in advance of
12 the DAGA meeting other than the e-mail that
13 we're looking at embodied in Exhibit 4?

14 A. Yes.

15 Q. Could you describe those
16 communications?

17 A. I think there were various e-mails
18 between me as a messenger for the MPAA and
19 General Hood's office, I think particularly
20 Meredith, regarding follow up to that meeting
21 in Florida.

22 Q. What particular -- what, in
23 particular, were you discussing in those
24 e-mails?

25 A. Follow-up items.

1 AG voice and that the concerns stem across all
2 industries, movies, music, pharmaceuticals,
3 other products that affect consumer safety."

4 So, again, here --

5 Q. You can go on. Please read the next
6 paragraph.

7 A. "Just trying to ensure not
8 taking" -- "not taken as an MPAA letter, avoid
9 the SOPA/PIPA perception, et cetera. Does that
10 make sense? That was the only concern. Thanks
11 again."

12 Q. Okay.

13 A. So, again --

14 Q. So please --

15 A. Well, i would like to clarify the
16 question, and I'm still answering your
17 question.

18 Q. You're not still answering the
19 question.

20 A. Okay.

21 Q. You indicated before that -- that --

22 MR. ROMMEL: Please let the witness
23 answer the question.

24 MR. RUBIN: The question has been
25 answered.

1 MR. ROMMEL: You can restate it.

2 Let the witness answer the question.

3 MR. RUBIN: The question has been
4 answered.

5 MR. ROMMEL: Objection. Let the
6 witness answer the question.

7 MR. RUBIN: We're not going to have
8 speeches being made.

9 THE WITNESS: I'm not making a
10 speech. I just want to clarify when I say,
11 "my" --

12 BY MR. RUBIN:

13 Q. Okay.

14 A. -- you asked me if -- you said,
15 "your personal." My personal concern -- that
16 was not my personal concern.

17 Q. Whose concern was it?

18 A. So...

19 I think it was a concern of the MPAA
20 leadership.

21 Q. Okay. Which -- who -- who -- who in
22 the MPAA leadership?

23 A. I don't know.

24 Q. How did you come to understand that
25 it was a concern of the MPAA leadership?

1 A. Through my supervisor.

2 Q. Who is your supervisor?

3 A. Vans.

4 Q. He communicated to you that it was
5 the concern of the MPAA leadership that this
6 letter not bear the fingerprint of the MPAA; is
7 that right?

8 MR. ROMMEL: Objection. Misstates
9 testimony.

10 MR. DAVIS: Objection. Form and
11 foundation.

12 THE WITNESS: He conveyed to me --
13 well, there is -- I think there is general
14 consensus from the AG working group that it was
15 important that as these issues played out
16 through this letter that the MPAA concern was
17 not of intellectual property theft. It was not
18 the only concern regarding this dangerous
19 behavior on the Internet. There was other --
20 there are other dangerous behaviors;
21 pharmaceuticals and whatnot.

22 So it was conveyed to me through
23 Vans that the MPAA leadership, and I imagine
24 all folks that -- all stakeholders that were
25 interested in these issues did not want this to

1 become just about intellectual property theft.
2 It was about the greater good of preventing
3 this dangerous behavior from being accessed
4 Google.

5 So what I was doing was clarifying
6 when I say, "my," I was speaking through the
7 input that I received from Vans that reflects
8 those other stakeholders.

9 Q. That reflects MPAA leadership.
10 That's what you testified to earlier?

11 A. Right.

12 Among other stakeholders, as well;
13 but, certainly, yes, MPAA leadership.

14 Q. But -- your e-mail says you want to
15 be sure that -- and I'm going to quote here,
16 "You guys" -- "anything you guys added didn't
17 make the letter seem like it was MPAA driven,"
18 close quote.

19 Do you see that?

20 A. Yes.

21 Q. That's because the letter emanated
22 from the MPAA and was sent to Attorney General
23 Hood's office; isn't that right?

24 MR. DAVIS: Objection. Form and
25 foundation.

1 MR. ROMMEL: Objection. Calls for
2 speculation. Misstates testimony. Lack of
3 foundation.

4 THE WITNESS: I know the letter -- I
5 know the letter had input from various people;
6 the MPAA, General Hood's office, and
7 potentially others that I'm not aware of.

8 BY MR. RUBIN:

9 Q. It was a collective effort?

10 MR. ROMMEL: Objection. Misstates
11 testimony.

12 BY MR. RUBIN:

13 Q. Is that right?

14 MR. DAVIS: Same objection.

15 THE WITNESS: I don't know the final
16 draft of the letter. I don't know who penned
17 the final draft of the letter. I know that
18 MPAA provided input to the letter.

19 BY MR. RUBIN:

20 Q. Would it be correct to say that you
21 worked with Attorney General Hood's office on
22 this letter?

23 A. Yes.

24 Q. Why do you think the MPAA wanted to
25 make sure that it didn't seem MPAA driven?

1 A. I don't know.

2 Q. You were just told that that was a
3 concern of -- of MPAA leadership?

4 A. I didn't develop policy or strategy.
5 I implemented, and those were the sentiments
6 that were conveyed to me.

7 Q. Policy and strategy were developed
8 by Vans Stevenson and those above him at the
9 MPAA; is that right?

10 A. I don't know who developed them, but
11 it wasn't me.

12 Q. Who do you understand developed
13 them?

14 A. I understand that Vans is part of
15 the leadership team.

16 Q. Who else is on the leadership team?

17 A. I don't know how you define
18 leadership team. It's certainly the CEO.

19 Q. Who is the CEO?

20 A. Chris Dodd.

21 Q. Who else?

22 A. I would imagine heads of
23 departments.

24 Q. Did Chris Dodd see the -- see a
25 draft of that letter?

1 MR. ROMMEL: Objection. Calls for
2 speculation.

3 THE WITNESS: I don't know.

4 BY MR. RUBIN:

5 Q. Would you expect him to have seen a
6 draft of that letter?

7 MR. ROMMEL: Same objection.

8 MR. DAVIS: Objection. Form and
9 foundation.

10 THE WITNESS: I don't know.

11 BY MR. RUBIN:

12 Q. Did you have input into other
13 letters or give the MPAA signoff on other
14 letters sent by the Attorney General's Office?

15 MR. ROMMEL: Objection. Vague.

16 THE WITNESS: I don't know that
17 there was ever an MPAA signoff. Did MPAA have
18 input into other letters sent by General Hood,
19 yes.

20 BY MR. RUBIN:

21 Q. I would like to introduce
22 Plaintiff's Exhibit 7.

23 (Deposition Exhibit No. 7 was marked
24 for identification.)

25 MR. DAVIS: What are you thinking

EXHIBIT B

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 GOOGLE, INC.,

4 Defendant,

5 v.

15 MC 150 (LGS)

6 TWENTY-FIRST CENTURY FOX, INC.
et al.,

7 Defendants.

8 -----x

New York, N.Y.
July 29, 2015
10:30 a.m.

11 Before:

12 HON. LORNA G. SCHOFIELD,

13 District Judge

14 APPEARANCES

15 WILSON SONSINI GOODRICH & ROSATI
Attorneys for Plaintiff

16 BY: DAVID H. KRAMER
MICHAEL H. RUBIN

17 JENNER & BLOCK, LLP
Attorneys for Defendants

18 BY: SCOTT BLOCK WILKENS
19 DAVID A. HANDZO

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1 (Case called; in open court)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.

4 MR. RUBIN: Michael Rubin of Wilson Sonsini for
5 petitioner Google.

6 MR. KRAMER: David Kramer from Wilson Sonsini also for
7 Google, your Honor.

8 THE COURT: Good morning.

9 MR. HANDZO: Good morning, your Honor. David Handzo
10 on behalf of respondents Twenty-First Century Fox and NBC
11 Universal and Viacom.

12 THE COURT: Good morning.

13 MR. WILKENS: Scott Wilkens from Jenner & Block also
14 on behalf of the respondent.

15 THE COURT: Good morning. First of all my apologies
16 that we're starting late. I didn't know the last matter was
17 going to take as long as it took.

18 We are here in connection with Google, the
19 petitioner's petition to transfer the motion to compel
20 compliance from third-party subpoena under Rule 45(f). I have
21 this matter as you know as the Part I judge. I think that
22 Judge Ramos had it before me. Judge Abrams briefly had it
23 after that. It is mine now for the moment. As I hoped was
24 clear in the order that I issued on July 23rd, I wanted to
25 revisit Judge Ramos's decision whether or not transfer is

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1 appropriate. So Google, which is the petitioner, has the
2 burden of proof. I have read -- I will not promise that I have
3 read all five inches of the material but I think I have read
4 the material parts, but I would like to hear a summary of your
5 argument as to why it should be transferred and then I will
6 hear the other side and then we can go from there.

7 So I am not sure who is speaking on behalf of
8 petitioner, Mr. Rubin or Mr. Kramer.

9 MR. RUBIN: It will be me, your Honor, Mr. Rubin.

10 I had understood your order to indicate that we should
11 be presenting new considerations, new arguments and new facts
12 not presented in prior briefing.

13 THE COURT: You can do both.

14 MR. RUBIN: I would be happy to summarize our previous
15 argument. That is rather straightforward. The basic issue
16 here is that the standard under Rule 45 is that where there are
17 exceptional circumstances, and the advisory committee rules
18 speak to that, that is where there are circumstances that are
19 likely to lead to interference with the management of the
20 underlying litigation. The advisory rules give two examples of
21 that where issues are pending in multiple districts or where
22 there are prior orders issued by the district courts that bear
23 on the issues in whatever is before the district court. Where
24 that occurs, exceptional circumstances exist. Unless there are
25 countervailing undue burdens, transfer is appropriate. We

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1 believe we showed that exceptional circumstances exist.

2 THE COURT: Can you update me at all on the facts or
3 are they still basically the same? The last I heard you had
4 filed a motion to compel in both Mississippi and in D.C. and
5 both were pending. Is that still the case?

6 MR. RUBIN: It is essentially the case, but let me
7 give you a brief update.

8 THE COURT: Okay.

9 MR. RUBIN: It is correct that in Mississippi the
10 motion to compel is still under submission with Judge Wingate
11 in the Southern District of Mississippi. He is the judge in
12 the underlying case against Attorney General Hood.

13 In the District of D.C. there are pending two motions.
14 They are consolidated motions against three different parties.
15 That is a motion to compel raising similar issues to the one
16 before your Honor from the time being anyway and a motion to
17 transfer those subpoenas to the Southern District of
18 Mississippi. Both of those are pending. We expect a ruling on
19 the transfer motion imminently.

20 We had also indicated last time we were before the
21 Court that we believed there was a possibility we might be
22 moving to compel against a third party. That is now happening.
23 We'll be filing that motion within a few days.

24 THE COURT: Where?

25 MR. RUBIN: Northern District of California. That

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1 motion will raise similar issues. Although I will be frank
2 that they have gone even further in withholding materials.
3 They have withheld everything, even their communications with
4 Attorney General Hood. They are another party that worked
5 alongside all the other parties here and the parties in D.C. in
6 the anti Google campaign.

7 THE COURT: There is some suggestion by the
8 respondents that your decision to file these various motions to
9 compel in different jurisdictions is strategic so that you can
10 get them all back to Mississippi. So tell me a little bit
11 about that.

12 MR. RUBIN: I can just flatly say it is not. We have
13 no choice. We're going where we have to go to find the
14 evidence. There was some questions, and I believe your Honor
15 said you had read the transcript from the last hearing, where
16 Judge Ramos asked me some questions about could we have served
17 the subpoenas elsewhere? We served the subpoenas where the
18 entities are located. That brought us to where we are. We
19 have the three in D.C, we have the three here, and we will now
20 have one more in the Northern District of California.

21 THE COURT: Tell me about the relationship of these
22 various entities to the lawsuit.

23 MR. RUBIN: We're learning more. I think it is
24 actually interesting. If you read our opening motion to
25 compel, our reply, the fact that I have had to put in an

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1 opening declaration, a supplemental and a second supplemental
2 and even yet a supplemental evidentiary submission because we
3 keep learning more. I can tell you what I know today. I can
4 tell you today that there are three parties in D.C. and to my
5 surprise counsel for all of them are here. Counsel for the DCA
6 is sitting in the back. That is the Digital Citizens Alliance.
7 Counsel for Jenner & Block and the MPAA, both in D.C., are here
8 because they represent the studios as well.

9 I don't want to retread old ground but a little bit.
10 Throughout the meet and confer process we have interacted with
11 quite a number of parties, but what has become clear is that
12 all of these parties worked together in some way to animate
13 Attorney General Hood's anti-Google efforts and to inspire
14 them. There are the three studios here that are at issue here
15 working in the litigation effectively as a single voice. Their
16 lobbyist at the Motion Picture Association of America, the
17 MPAA, and an affiliated organization called the Digital
18 Citizens Alliance have worked together to provide information
19 to Attorney General Hood to draft to CIE that was at issue that
20 prompted the underlying lawsuit, to fundraise for him, to hire
21 a PR agency for him, to ghost write press release for him and
22 to do all the other things that we have yet to learn about.
23 The document we submitted as supplemental evidence -- I think
24 it is docket entry 40 -- is quite instructive. It lays out a
25 plan.

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1 THE COURT: I am curious and it has no bearing on my
2 decision, but is there liability on their part?

3 MR. RUBIN: It's an interesting party. There is no
4 claim against them.

5 THE COURT: I understand that. They are all
6 third-party witnesses.

7 MR. RUBIN: I don't know. The documents that we
8 submitted on the 23rd, docket entry 40, talks about some rather
9 surprising things -- stock manipulation efforts, efforts to
10 submit material to the SEC. That is not something we're
11 pursuing in the Southern District of Mississippi or at this
12 time. It does raise one's eyebrows I agree.

13 THE COURT: Tell me a little bit about discovery with
14 petitioner's here. As I understand it there has been some
15 limited exchange of documents; is that right?

16 MR. RUBIN: Yes. Let me explain that. I was going to
17 get into that anyway. The discovery with the petitioners here
18 has been in a word frustrating. I am not going to get into the
19 materials that they have agreed -- not agreed to produce. They
20 have agreed to produce a certain set of documents.

21 THE COURT: There has been no actual production yet?

22 MR. RUBIN: There has been an actual production.

23 THE COURT: What form did it take?

24 MR. RUBIN: It took the form of a PDF.

25 THE COURT: They were e-mailed?

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1 MR. RUBIN: I don't know how they were sent to us.
2 They were e-mailed completely to avoid custodial information.
3 As we get from supplemental productions from Attorney General
4 Hood, it became clear to us that the representation to us--

5 THE COURT: I just want to go back to something much
6 more basic. You're in California. They are producing
7 documents to you. Lawyers are not running around to
8 Mississippi to make production to you. They are sending them
9 electronically somehow; is that right?

10 MR. RUBIN: Absolutely.

11 THE COURT: There is no burden because whether this
12 production of discovery itself is in Mississippi or California
13 or whatever it is; is that right?

14 MR. RUBIN: 100 percent. The only time I have seen
15 them face-to-face has been in court.

16 THE COURT: But if I were to transfer this, the motion
17 to compel would require someone to show up in Mississippi?

18 MR. RUBIN: Absolutely not.

19 THE COURT: Why is that?

20 MR. RUBIN: Rule 45 actually speaks to this.

21 THE COURT: I know that if the judge is amenable, they
22 get can appear by phone.

23 MR. RUBIN: Judge Wingate is amenable. In fact more
24 than one of his hearings have been held by phone in the main
25 case. There is every reason to believe that he would be open

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1 to it. They indicated they are not interested in that.

2 THE COURT: I understand. That is a strategic
3 decision people make.

4 MR. RUBIN: Agreed.

5 THE COURT: If you don't mind I am going to ask you to
6 sit down and I will hear from the petitioners.

7 So tell me why it is hardship for this to be in
8 Mississippi?

9 MR. HANDZO: Your Honor, it is a burden because as you
10 point out we're going to be making lots of trips to Mississippi
11 if this case gets transferred. It is -- we've had multiple
12 hearings already of course in this case and there will be more
13 to come if the case stays here.

14 THE COURT: I notice you're from Washington so you are
15 traveling to come here. It is not as though you are down the
16 street.

17 MR. HANDZO: Trust me, your Honor, there is a world of
18 different between getting on the Acela to come to New York and
19 I do my best work on the Acela. Going to Mississippi is a
20 different ballgame. It is going to be multiple trips. I think
21 you probably already have a sense of the litigiousness of this
22 matter.

23 THE COURT: What I have also heard is that Judge
24 Wingate will accommodate counsel by having conferences on the
25 phone if counsel wish to appear that way. I know sometimes

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1 lawyers are not interested in that and they think there is
2 value to being in court. That is a strategic decision.

3 MR. HANDZO: Your Honor, I don't know whether Judge
4 Wingate would have accommodate it. Maybe he would. This is
5 way too important to my clients to be phoning it in. I am one
6 of those old-school lawyer who likes to be in front of a judge
7 and see facial expressions. I don't think my clients would be
8 willing to do this by telephone.

9 If I, may, I want to address the Courts questions but
10 I want to go back to the question you asked in your order
11 initially which is what has changed since Judge Ramos's ruling
12 and the answer is not a lot but some. One of the things that
13 has changed is we have filings from Google in the District of
14 Columbia that confirm a lot of the things that I said when I
15 was last here arguing the motion to transfer and underlining
16 some of the things that Google was saying at that time. For
17 example -- by the way, I have a set of those filings if the
18 Court would like them.

19 THE COURT: No. Go ahead and tell me about them.

20 MR. HANDZO: One of the things -- let me back up. The
21 filings arose because after Judge Romas ruled that the case
22 would not be transferred, we of course sent a short document to
23 the magistrate judge in D.C. with the transcript of that
24 hearing and Google then filed a response to that and they were
25 a couple more back and forths after that.

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1 When we were here Google argued that the New York
2 subpoenaed parties played "staring roles" in this whole
3 underlying manner that is playing out in Mississippi and that
4 was part of their argument, that because of the staring role
5 they could be transferred to Mississippi because they were so
6 engaged with it. Well, after Judge Ramos's ruling what they
7 wrote to the judge in D.C. was something quite different. It
8 turns out the New York subpoenaed parties were not terribly
9 important or involved at all. Google said, "While the movie
10 studies in New York were involved in lobbying AG Hood, it was
11 primarily their lobbyist of the MPAA and Jenner who directed AG
12 Hood pursue Google." So suddenly these parties have become
13 much less important apparently.

14 Also, one of the things that came out in those filings
15 was one of the arguments that Google made in this case was that
16 there is -- we should transfer both the D.C. and the New York
17 cases to Mississippi in part to avoid inconsistent rulings
18 between the D.C. and the New York courts. What Google said in
19 its filing with this Court was "Google's motion to compel here
20 is nearly identical to Google's consolidated motions already
21 filed in the District Court for the District of Columbia
22 against the subpoenaed parties." That is what they are arguing
23 here. We pointed out that is not correct. There is some
24 overlap but there are significant differences between subpoenas
25 in New York and subpoenas in D.C.

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1 So when Google then filed its response in D.C. after
2 Judge Ramos's ruling, it now says that the subpoenas served in
3 New York "were considerably more limited than those at issue
4 here," meaning in D.C. So now all of a sudden Google is
5 agreeing to Judge Ramos that these subpoenas are not the same.
6 They are different and they are more limited here.

7 So there are those changes. The other thing is maybe
8 not technically a change but something I think worth bringing
9 to the Court's attention. There are some number -- there is
10 two, that I know of, discovery motions pending before Judge
11 Wingate neither of them having anything to do with the issues
12 here.

13 THE COURT: Can I interrupt for a second? Are they
14 still on an expedited deadline down there to end on August?

15 MR. HANDZO: I believe it is August 10th, your Honor.
16 Whether it holds is a different matter. That is the point I
17 wanted to get to.

18 THE COURT: Okay.

19 MR. HANDZO: It is this: One of the motions filed in
20 Mississippi was filed by Google. What happened was the
21 Attorney General Hood produced a number of documents but then
22 he withheld some based on privilege. Google filed a motion to
23 compel arguing that the privilege was not valid and those
24 documents should be produced. Back on May 21st Judge Wingate
25 heard argument on that and asked to see the documents that were

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1 maybe 20 so he could look at them in camera. He still has not
2 ruled on that. So it has been May 21st to today. Still no
3 ruling on that.

4 THE COURT: How does that help you? It seems to me
5 that to the extent he is still trying to decide on issues that
6 impact the scope of discovery that that suggests he should be
7 able to do that and he should be able to do it broadly.

8 MR. HANDZO: No. I think what it means, Judge, is
9 that Google's point was, gee, we need to get it transferred
10 because we need a quick ruling. I think the reality is a quick
11 ruling is going to come here, not in Mississippi. Judge
12 Wingate -- I don't know anything about Judge Wingate's docket,
13 but I have heard it is pretty busy. We've had these fairly
14 straightforward motions pending down there that have been
15 pending for a long time. It is unconceivable to me that if
16 there is a quicker ruling down there by the time we refile
17 briefs, get a hearing date, get down there, it is going to
18 happen much quicker here. I think the time going on since we
19 were last here just confirms that fact. If Google is sincere
20 in saying that they want a quick ruling, this is where it
21 should be. It will not be in Mississippi.

22 So having said all that, your Honor, I, like
23 Mr. Rubin, I read the Court's order and doesn't want to
24 transgress by making all of my arguments again and I hope I
25 made them appropriately in the transcript, but no lawyer can

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1 resist a second bite at the apple if there is even a little bit
2 of opening. Let me repeat a couple things.

3 THE COURT: Okay.

4 MR. HANDZO: I think Google's really principal point
5 on the motion to transfer was that there was a risk of
6 inconsistent rulings as between Mississippi, D.C., and New
7 York. I think I have already covered the D.C. versus New York
8 because in fact the subpoenas are different and Google now
9 admits --

10 THE COURT: I think you said the New York subpoena is
11 more limited.

12 MR. HANDZO: Yes, the subpoena is more limited. There
13 are some things that are asked for in New York that we oppose
14 that are not in the D.C.s subpoena. For example, they have
15 asked for all communications of all attorney generals other
16 than Attorney General Hood. More critically I think Google has
17 argued that any ruling here could be inconsistent with rulings
18 that Judge Wingate may be making in Mississippi. That simply
19 is not correct. There is nothing happening in the discovery
20 front in Mississippi that is in any way related to what is
21 happening here. The reason for that is, you asked Judge, what
22 has been produced. What has been produced is all of the
23 communications exchanged between these subpoenaed parties and
24 Attorney General Hood. That has been given to them. Also
25 documents showing any financial -- political contributions to

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1 Attorney General Hood or to the Democratic attorney general.
2 What is in question are documents that Attorney General Hood
3 never received.

4 THE COURT: I understand that. Perhaps just to make
5 it a little more interesting for you on that particular issue
6 knowing almost nothing about your case, it seems to me that
7 there are all sorts of documents that Attorney General Hood
8 never saw that are conceivably relevant. Certain kinds of
9 e-mail communications internally of your client that might
10 relate to the subject for example. Those could be highly
11 relevant. Part of what I am saying sort of as a footnote is be
12 careful what you wish for because you may find yourself in a
13 worse position if you were before a judge who actually
14 understood the case.

15 MR. HANDZO: I understand there is a risk in
16 litigation no matter what position you take. Perhaps we'll
17 have a further conversation on that point at some other time.
18 The fundamental point to the motion to transfer is that the
19 issues that Judge Wingate is considering relate to documents
20 that Attorney General Hood has. The issues here relate to
21 documents that he does not have. There is not really any
22 overlap in that. There is just nothing that Judge Wingate has
23 under consideration that would resolve the issues that are
24 being raised in the motion to compel here.

25 Where I think in the end that leaves Google is there

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1 is kind of a general argument, that, well, the Court in the
2 underlying action is going to know the relevance better than
3 this Court perhaps or there is some judicial efficiency in
4 transfer this all to one place. The problem for that argument
5 is that that simply is not what the drafters of the rules said.
6 The drafters of the rules could have gone in that direction,
7 but they didn't. They required extraordinary circumstances
8 which the advisory committee said is only likely to arise in
9 rare occasions.

10 THE COURT: I will interrupt you here. I actually
11 heard a lot of the dialogue around the passage of this rule and
12 they were afraid that judges would reflect the case back to the
13 original district and they didn't want that to happen.

14 If you don't mind, I am going to stop you right there
15 unless there is any last burning point you need to make.

16 MR. HANDZO: There is not a burning point unless
17 Mr. Wilkens tells me there is and he tells me there isn't.

18 THE COURT: I am prepared to rule then.

19 I am going to grant the motion for transfer.
20 Petitioner's Rule 45(f) motion to transfer is granted.
21 Petitioner's motion to compel compliance with subpoenas at
22 Docket No. 1 is hereby transferred to the Honorable Henry
23 Wingate in the United States District Court for the Southern
24 District of Mississippi. I will give you some explanation of
25 my finding.

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1 As we all know Judge Ramos -- then acting as Part I
2 Judge -- heard oral argument on this motion on July 10, 2015.
3 He denied the motion to transfer, but he also said explicitly
4 it was a very close call. The Order I issued on July 23, 2015,
5 states, "a district court possesses the inherent authority to
6 sua sponte reconsider its own interlocutory orders before they
7 become final." *Chartis Seguros Mexico, S.A. de C.V. v. HLI*
8 *Rail Rigging, LLC*, No. 11 Civ. 3238, 2015 WL 545565, at *2
9 (S.D.N.Y. Feb. 9, 2015). In other words, "application of the
10 law of the case doctrine is discretionary and does not limit a
11 court's power to reconsider its own decisions prior to final
12 judgment." *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d
13 Cir. 2001).

14 That is all a short way of saying I have the power to
15 essentially change the mind of the court and make a different
16 decision from the decision that Judge Ramos made and that is
17 what I am doing. I did want to hear the parties on what more
18 developed and I appreciate the parties making those arguments.

19 I am well aware of what the commit notes to Rule 45(f)
20 provide. They state, "The court may transfer in exceptional
21 circumstances, and the proponent of transfer bears the burden
22 of showing that such circumstances are present. The prime
23 concern should be avoiding burdens on local nonparties subject
24 to subpoenas, and it should not be assumed that the issuing
25 court is in a superior position to resolve subpoena-related

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1 motions. In some circumstances, however, transfer may be
2 warranted in order to avoid disrupting the issuing court's
3 management of the underlying litigation, as when that court has
4 already ruled on issues presented by the motion or the same
5 issues are likely to arise in discovery in many districts.
6 Transfer is appropriate only if such interests outweigh the
7 interests of the nonparty served with the subpoena in obtaining
8 local resolution of the motion.

9 For the sake of expediency, I will not reiterate the
10 remainder of the factual background and applicable law that
11 Judge Ramos thoroughly laid out at the July 10 Hearing. As
12 Judge Ramos said, this is an "extremely close case" where
13 "reasonable minds can disagree." Although I disagree as to the
14 ultimate resolution of this motion, I agree with Judge Ramos'
15 summary of the history of this case as well as his assessment
16 of the applicable law. I will add, however, that -- since Rule
17 45(f) became effective on December 1, 2013 -- there have been
18 just over 40 written opinions citing Rule 45(f) to date. Of
19 those that adjudicate Rule 45(f) motions, and not all of them
20 do, the majority grant the motion to transfer.

21 I find that, here, exceptional circumstances --
22 including Judge Wingate's management of the underlying
23 litigation -- outweigh the interests of the subpoenaed parties
24 in obtaining local resolution of the motion. It is for that
25 reason I am granting Google's motion to transfer.

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1 First, I agree with Judge Ramos that "Google has the
2 better of the undue burden argument." "Other courts have
3 indicated that concerns regarding the burdens of transfer are
4 lessened when the disputed subpoena is directed to a large
5 corporation, rather than an individual person." I am quoting
6 Agincourt Gaming, LLC v. Zynga, Inc., No. 14 Civ. 0708, 2014 WL
7 4079555, at *8 (D. Nev. Aug. 15, 2014) The fact that the
8 subpoenaed party is "a large corporation represented by
9 sophisticated counsel is by no means a dispositive
10 consideration, but it is relevant as the Court evaluates any
11 burden imposed." Id.

12 Here, the subpoenaed parties argue that they would be
13 subject to undue burden, as they have no offices in Mississippi
14 and would therefore be required to travel more than 1,000 miles
15 for litigation in which they are not a party. "Almost any
16 subpoenaed party could make the same undue burden arguments" --
17 that litigating its discovery dispute in a foreign district
18 would cause the party undue burden. Chem-Aqua, Inc. v. Nalco
19 Co., No. 14 Misc. 71, 2014 WL 2645999, at *3 (N.D. Tex. June
20 13, 2014). Furthermore, the subpoenaed parties may be
21 permitted to make telephonic appearances at any hearing in
22 Mississippi. I am told by counsel for Google that in fact is
23 the case. See id at *3-4.; see also Judicial Watch, Inc. v.
24 Valle Del Sol, Inc., No. 14 Misc. 0538, 2014 WL 4954368, at
25 *3-5 (D.D.C. Oct. 3, 2014) and Moon Mountain Farms, LLC v.

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1 Rural Cmty. Ins. Co., 301 F.R.D. 426, 430 (N.D. Cal. 2014).

2 Accordingly, I find the subpoenaed parties have failed
3 to show they would be subject to undue burden should the
4 subpoena-related motions be transferred to Judge Wingate.

5 Turning to exceptional circumstances, I find that
6 Google has demonstrated circumstances that warrant transfer of
7 the subpoena-related motions, as contemplated by Rule 45(f).

8 First -- although questions of relevance come up in
9 any case -- the questions of relevance here implicate the scope
10 of discovery in the underlying litigation before Judge Wingate.
11 Citing considerations of judicial efficiency and comity, courts
12 have granted Rule 45(f) motions where the subpoena-related
13 motions go to the scope of discovery in the underlying
14 litigation. In F.D.I.C. v. Everest Reinsurance Holdings, Inc.,
15 for example, Judge Failla of this court transferred a motion to
16 compel and noted that, as the judge in the underlying
17 litigation had yet to rule on the relevance of the subpoenaed
18 information, and I gather it is similar here. She wrote,
19 "wishes not to hamstring his ability to control and delineate
20 the parameters of discovery in the" underlying action. No. 13
21 Misc. 381, 2014 WL 260589, at *2 (S.D.N.Y. Jan. 23, 2014).
22 Likewise, in Wultz v. Bank of China, Ltd., the court granted a
23 Rule 45(f) motion to transfer to Judge Scheindlin of this court
24 who was presiding over the underlying litigation -- "due to her
25 familiarity with the full scope of issues involved as well as

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1 any implications the resolution of the motion will have on the
2 underlying litigation." 304 F.R.D. 38, 47 (D.D.C. 2014).
3 Courts have likewise rejected arguments by subpoenaed parties
4 that the subpoenas at issue are irrelevant to the underlying
5 dispute and held instead that such relevance arguments
6 "emphasize the need for the court where the underlying matter
7 lies to decide" the subpoena-related motions. See XY, LLC v.
8 Trans Ova Genetics, L.C., No. 14 Misc. 00778, 2014 WL 4437728,
9 at *2 (D.D.C. Sept. 10, 2014). In Federal Home Loan Mortgage
10 Corp. v. Deloitte & Touche LLP, the court rejected the very
11 argument that respondents present here -- "that nearly all
12 motions to compel would be subject to transfer if the rule were
13 so broad as to encompass any motion where another court has to
14 make a relevancy determination." 15 Misc. 568, 2015 WL
15 3413540, at *2 (D.D.C. May 2015). There, the court held that
16 "resolution of the motion to compel requires delving into
17 substantive issues in the highly complex underlying action" --
18 which I find to be the case here as well. I likewise reject
19 the subpoenaed parties' argument that these subpoenas present
20 only a "run-of-the-mill relevance dispute" -- the questions of
21 relevance here run much deeper than garden-variety relevance
22 objections.

23 Second, the main Mississippi litigation in the present
24 case is subject to an expedited discovery schedule, currently
25 set to conclude on August 10. The parties expected to move

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1 rapidly into summary judgment after the close of discovery.
2 Courts have considered unusual discovery timetables in granting
3 Rule 45(f) motions. See, e.g., Federal Home Loan Mortgage
4 Corporation, 2015 WL 3413540, at *3 and In re Subpoena to Kia
5 Motos America, Inc., No. 14 Civ. 315, 2014 WL 2118897 at *1
6 (C.D. Cal. Mar. 6, 2014). Courts have also considered the
7 history of discovery in the underlying litigation,
8 particularly, how contentious discovery has been to date.
9 Seems to be the case here. See Elliot v. Mission Trust Servs.,
10 LLC, No. 14 Civ. 972, 2014 WL 7157156, at *3 (W.D. Tex. Dec.
11 12, 2014). Accordingly, I find that the transfer may help
12 avoid unnecessary disruption with Judge Wingate's management of
13 his case particularly in light of the looming discovery cutoff
14 date.

15 Third, I note separately that the allegations that
16 Google presents here resemble those in the underlying
17 litigation addressed in Valle Del Sol, Inc. v. Kobach, No. 14
18 Misc. 219, 2014 WL 3818490 (D. Kan. Aug. 4, 2014), and Judicial
19 Watch, Inc., v. Valle Del Sol, Inc., No. 14 Misc. 0538, 2014 WL
20 4954368 (D.D.C. Oct. 3, 2014). The underlying litigation in
21 those cases involved allegations that state officials in
22 Arizona worked in concert with private organizations to commit
23 constitutional violations. In both cases, the courts agreed to
24 transfer the subpoena-related motions to the District of
25 Arizona.

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1 By contrast, I am not persuaded by any of the
2 subpoenaed parties' remaining arguments in opposition. First,
3 as they admit in their opposition, "the subpoenaed parties
4 declined to search for, review or produce documents that AG
5 Hood never saw, including internal communications about
6 contributions to AG Hood." They contend that "such documents
7 are completely irrelevant to the underlying litigation." As I
8 mentioned I am not persuaded at this juncture that this is
9 necessarily true, and Judge Wingate is best positioned to
10 evaluate the merits of the subpoenaed parties' arguments.
11 Second, the subpoenaed parties contend that Google's need to
12 issue multiple subpoenas in multiple jurisdictions was
13 "dubious" and that Google's subpoenas were simply a "tactical
14 ploy to create arguments for transfer, rather than any real
15 need for discovery." At this stage I am hesitant to conclude
16 this is the case particularly when Google has subpoenaed third
17 parties necessary where third parties are located.

18 So in closing I find that the exceptional
19 circumstances here outweigh any interest that the subpoenaed
20 parties have in obtaining local resolution of the motions.
21 Google's Rule 45(f) motion to transfer is therefore granted. I
22 will issue a short written order to that effect later today.

23 Thank you.

24 oOo

25

